

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

IGOR ZBITNOFF, EILEEN ANDREOLI,)	
JEFFREY FROST, RICHARD JOSEPH,)	
JULIET BETH BUCK, RAY GONDA, STOP)	
THE F-35 COALITION and THE CITY OF)	
WINOOSKI,)	
Plaintiffs,)	
)	
v.)	Civil Action No. 5:14-cv-132
)	
DEBORAH LEE JONES, Secretary of the)	
Air Force,)	
Defendant.)	

**SOUTH BURLINGTON'S *AMICUS CURIAE* MEMORANDUM IN LIMITED
SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

The City of South Burlington ("City" or "South Burlington"), as *amicus curiae*,¹ submits the following memorandum in limited support of Plaintiffs' Motions for Summary Judgment. More particularly, South Burlington respectfully contends that the Sept. 2013 Final Environmental Impact Statement for United States Air Force F-35A Operational Basing ("FEIS"): (I) Did not provide adequate information as to noise impacts on the City, or mitigation thereof (Count I of Plaintiffs' Second Amended Complaint dated April 29, 2015); and (II) Did not provide adequate information as to potential health and safety impacts which could result from noise or an F-35A crash within or near the City (Plaintiffs' Count VI and IX).

Background

The United States Air Force has decided to beddown the F-35A Lightning II

¹ In light of timing, South Burlington has filed this Memorandum simultaneously with its Stipulated Motion by the City of South Burlington for Leave to Participate in Briefing as *Amicus Curiae*.

(“F-35A”) with the 158th Fighter Wing of the Vermont Air National Guard (“VTANG”), stationed at Burlington Air Guard Station (“AGS”) at Burlington International Airport (“BTV”). See Record of Decision for the First Air National Guard F-35A Operational Base, December 2, 2013. South Burlington respectfully agrees with Plaintiffs’ contentions that the Air Force has not provided adequate information to the public concerning resulting noise impacts or mitigation thereof, as well as potential health and safety risks. See *Sierra Club v. U.S. Forest Service*, 857 F.Supp.2d 1167, 1175 (D. Utah 2012) (Under the National Environmental Policy Act (“NEPA”), “it is not sufficient only to consider relevant information, but that information must also be adequately disclosed to the public. NEPA’s ‘twin aims’ are ‘informed agency decision making and public access to information.’”) (quoting *Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 707 (10th Cir. 2009)).

The City is a regional employment, trade, housing and transportation center and home to high quality elementary, secondary, and higher education schools. See generally South Burlington Comprehensive Plan (AR 19471-19688).² The City contains a vibrant mix of newer and long-established neighborhoods, serving a population that is increasingly diverse in its socioeconomic and ethnic composition. South Burlington is a growing city, as its 2010 population was measured at

² South Burlington’s Comprehensive Plan effective March 9, 2006 was in effect through March 9, 2011, when the 2006 Plan was readopted. See 2016 South Burlington Comprehensive Plan § 1.3 at 1-8 (available at http://www.sburl.com/vertical/Sites/%7BD1A8A14E-F9A2-40BE-A701-417111F9426B%7D/uploads/SB_Comprehensive_Plan_Complete_Adopted_2-1-2016.pdf). The Index for Administrative Record, *Zbitnoff v. James*, Civil Action No. 514-cv-132 (D Vt.), incorrectly labels the version of the Comprehensive Plan in the AR as the “2001” Comprehensive Plan, but the actual document in the AR is, in fact, the 2006 Plan.

approximately 17,900, an increase of between 13-20% from 2000. FEIS § BR3.11.1.1 at BR4-77; AR 60015.

The City is strongly committed to providing residents a healthy and enjoyable environment in their homes, places of employment, and schools. See, e.g., AR 19602. A healthy local economy supports municipal services and the City's education system.

I. SOUTH BURLINGTON IS CONCERNED THE FEIS DID NOT ADEQUATELY REVIEW NOISE IMPACTS AND POSSIBLE MITIGATION STRATEGIES.

The City's land area consists of approximately 10,600 acres in the western portion of Chittenden County, Vermont. AR 19491. The City of Burlington's land holdings in South Burlington which make-up BTV, plus residential lands acquired under the Part 150 Noise Compatibility Program ("NCP"), total over 880 acres, approximately eight percent of the City's total land area.³ Burlington AGS occupies 280 acres within BTV pursuant to a lease with the City of Burlington. FEIS § BR1.0 at BR4-1.

"[I]ncreased noise is an unavoidable consequence of basing the F-35A at Burlington." Defendant's Mem. In Opp. to Plaintiffs' Motion For Judgment On The Record And In Support Of Defendant's Cross Motion For Judgment On The Record (hereafter "Air Force MSJ") at 36. "[D]ata indicate that the F-35A would generate generally higher noise levels than the F-16 aircraft it is replacing except in

³ See, e.g., 2012-13 South Burlington Grand List at http://www.sburl.com/index.asp?Type=B_BASIC&SEC=%7B9F3596E0-9721-430E-9F6D-F2C28AAE6721%7D. The 280 acres listed in the FEIS as the land area for the Burlington AGS do not appear to include the runways or other elements of BTV utilized by VTANG for flight operations. See FEIS BR4-5.

afterburner take-off.” FEIS at BR4-23. The loudest sound level generated by the F-35A, compared to the current F-16, is at least 20 dbA higher for every measured flight activity. See FEIS Table BR3.2-1 at BR4-23.

Much of the land area currently within the 65 db DNL contour due to operation of F-16s is located within South Burlington. See FEIS Figure 3.2-1 at BR4-25. Residential land area within the 65 db DNL contour would increase by 150 to 190 acres over the 238 acres of residential land area already within the 65 db DNL contour due to F-16 operations. FEIS Table 3.10-2 at BR4-67. However, the FEIS does not state what portion of residential acreage to be affected by F-35A noise is located within each of the affected municipalities.

BTV is located in the northern part of the City in the Williston Road Area.

Most of the older South Burlington residential neighborhoods are located in the Williston Road area, and it is the City's intention to protect existing neighborhoods from commercial encroachment and traffic disruption. These homes are relatively low-cost by today's standards. These neighborhoods are home to many of the City's longtime residents and provide reasonably priced starter homes on the market for young families.

AR 19493. Neighborhoods in this area include Mayfair Park, Pine Tree Terrace, O'Brien Farm, Country Club Estates, Valley Ridge, Tree Tops, Twin Oaks, Winding Brook, and Chamberlin.

The interface between BTV and the immediately adjacent Chamberlin neighborhood is among the most challenging issues facing the City. Since the late 1990s, and projected through towards 2020, BTV has been carrying out a plan under the NCP to purchase and demolish noise-impacted homes in the Chamberlin

neighborhood within the 65 dB DNL zone. See FEIS BR4-66-67. Since 2003, approximately 135 homes have been acquired and removed under the NCP, see AR 25170, 25175, negatively impacting affordable housing in the City and reducing residential property values and property tax revenues.

The City's Comprehensive Plan calls for preservation of housing and neighborhoods. See AR 8396-98. Yet, the FEIS does not adequately discuss the noise impacts to South Burlington's neighborhoods and affordable housing stock.⁴ While the FEIS's description may possibly be accurate regarding noise levels to be experienced in various locations and the number of households projected to be affected, the public has not been adequately informed as to the consequences of such noise levels. Neither does the FEIS discuss with any certainty mitigation measures to be made available to minimize such consequences, leaving the public uncertain about what, if any, mitigation might actually take place in the affected South Burlington neighborhoods.⁵ Given the history of degradation to the Chamberlin neighborhood resulting from the current approach of razing noise-affected homes, South Burlington is vitally interested in alternative feasible mitigation options. The FEIS falls short of satisfying NEPA's requirements in this regard.

Noise impact on education of South Burlington public school students is also a serious concern not adequately addressed in the FEIS. Gertrude E. Chamberlin

⁴ See Memorandum In Support of Plaintiffs' Motion for Summary Judgment or Judgment on the Record at 28-29 for additional discussion of the South Burlington Comprehensive Plan and housing issues.

⁵ Appendix C of the FEIS contains broad statements by the Air Force referencing local government ability to regulate land use around airports. See, e.g., AR 8527.

Elementary School is located in the Chamberlin neighborhood adjacent to BTV. Chamberlin School is located with the 65 dB DNL zone under the current baseline conditions and will continue to be within the 65 dB DNL after beddown of the F-35A. See FEIS Figures BR3.2-1 at BR4-32 and BR3.2-2 at BR4-37. The school currently experiences speech interference due to noise, see FEIS Table BR3.2-5 at BR4-28, as well as the highest outdoor equivalent noise level of schools presently affected by F-16 operations. See FEIS Table BR3.2-5 at BR4-28. Chamberlin is projected to continue to experience the same or increased noise interference with classroom activities following F-35A beddown. See FEIS Table BR3.2-11 at BR4-33, Table BR3.2-17 at BR4-38.

The FEIS does not disclose the degree to which the projected noise levels may adversely affect elementary school students' learning, nor does it provide a comprehensive review of potential noise mitigation strategies for the learning environment. For the past two years, South Burlington has been discussing possible closure of Chamberlin School due to the impact of aircraft noise on students. More information is necessary about F35-A noise impacts on Chamberlin School, particularly due to the broader implications noise-related closure of the school may have on the City's education system and its taxpayers.

II. SOUTH BURLINGTON IS CONCERNED THE FEIS DID NOT ADEQUATELY REVIEW IMPACTS ON HEALTH AND SAFETY.

A. Noise Impacts on Health

The general effects of noise on the health and welfare of the residents of South Burlington are another concern of the City. To the extent that noise from the

operation of the F-35A at BTV will increase residents' general noise exposure, speech interference, sleep disturbance and potential for hearing loss, the City has a strong interest in the public receiving comprehensive information from the Air Force about these impacts.

Discussion of possible health effects associated with the noise exposures is presented in a general sense in Appendix C to the FEIS. See AR 11550 et seq. However, the Air Force does not appear to have addressed whether there exists available research about possible correlation between health problems and exposure to noise at levels projected to result from F-35A operations at BTV. Compare AR 60012-13 to AR 11566-11580. There is absence from the FEIS of a either a review of relevant epidemiological studies or a statement that the Air Force reasonably exhausted information-gathering on the subject. See, e.g., *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 1845, 490 U.S. 332, 349 (1989) (NEPA “ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.”). None of the information discussed in Appendix C to the FEIS appears to specifically review possible adverse health or learning impacts in South Burlington or the other affected BTV-area communities.

B. Aircraft Accident Impacts on Health and Safety

The City also has a very significant interest in the safety of its residents and its first responder personnel. In the service of its residents, the City has established a 43-member Police Department and a 28-member Fire Department, through which emergency response activities are coordinated. The South Burlington Fire Department (“SBFD”) serves the civilian buildings at BTV while runways and military buildings are served by the VTANG Fire Department. In addition, the SBFD supports surrounding communities and VTANG through mutual aid agreements.

The City appreciates and acknowledges VTANG’s excellent safety record. See FEIS BR 4-49-50. However, the F-35A is a new aircraft. See FEIS BR4-51. The FEIS acknowledges that “historical trends show that mishaps of all types decrease the longer an aircraft is operational as flight crews and maintenance personnel learn more about the aircraft’s capabilities and limitations.” *Id.* Stated another way, the Air Force posits that the risk of mishap for new aircraft, such as the F-35A, is greater than the risk for established aircraft, such as the F-16.

Data in the FEIS suggests the risk of crash could remain, for some time, significantly higher for F-35A aircraft at BTV than the risk associated with current F-16 aircraft. Over a ten year period of operation of the F-22A (Raptor) (used in the FEIS as comparable for F-35A projections), the “Class A” mishap rate was 7.34 mishaps per 100,000 flight hours.⁶ FEIS Table BR3.4-1 at BR4-52. The lifetime

⁶ Class A mishaps are “the most severe with total property damage of \$2 million or more or a fatality and/or permanent total disability. Comparison of Class A mishap rates for various aircraft types, as

rate for the F-16 is 3.55; i.e., less than half of the average rate for the F-22A after ten years of operation. Moreover, in FY12, the F-22A experienced a much higher Class A mishap rate of 11.32. Several additional years of crash rates for the F-22A should now be available for disclosure to the public.

As the FEIS acknowledges, “the primary concern with regard to military training aviation is the potential for aircraft mishaps (i.e., crashes) to occur.” FEIS 3-25, BR4-49. Densely populated South Burlington neighborhoods are immediately adjacent to BTV. See FEIS Figures BR3.2-1 and BR3.2-2. BTV’s Runway Protection Zone (“RPZ”), described as the “area[] recognized as having the greatest risk of aircraft mishaps, most of which occur during take-off or landing,” is also located in South Burlington. FEIS BR 3-26; 4-49.

Given its location as the site of F-35A operations, the close proximity of densely populated areas of the City, and the likelihood that South Burlington emergency personnel would be called to respond to a crash, the City has significant and very reasonable concern about the crash risk presented by the F-35A. The City’s concern is heightened by the presence of the “radar-absorbent composite materials” utilized in the F-35A. FEIS BR 1-4. As reviewed in Plaintiffs’ summary judgment memoranda, questions about the potential danger arising from involvement of composite materials in a fire or crash were raised by the public during the comment period and were subject to internal Air Force discussions. However, information about such possible risks does not appear to have been

calculated per 100,000 flying hours, provide the basis for evaluating risks among different aircraft and levels of operations.” FEIS BR 3-27.

included in the FEIS. Even if it is true that composite materials and other features of the F35-A do not pose special risks to first responders or the community, as the Air Force contends in section VI of the Air Force MSJ, the lack of public information in response to a substantial area of public concern is problematic. NEPA calls for disclosure of additional information about the dangers presented by the combustion of composite and stealth materials so that the City and public can better understand safety issues inherent in the F-35A beddown at BTV.⁷

Conclusion

The FEIS issued by the Air Force does not fully address the F35-A beddown's potential noise, health, and safety impacts to the City of South Burlington and its residents, children, first responders, employers and visitors. Additional public information on these topics will bolster the City's partnership with VTANG now and in the future.

Dated at Burlington, Vermont on June 28, 2016.

CITY OF SOUTH BURLINGTON

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⁷ The AR reflects that the Air Force contends such information is publicly available or that the Air Force would make such information available to first responders. See, e.g., AR 64449 et seq. However, the AR suggests there is more detailed information now available which is possibly unknown to the public. See, e.g., AR64453 (comparing quantities of stealth materials in F-16 vs F-35A).

CERTIFICATE OF SERVICE

I, John H. Klesch, hereby certify that on June 28, 2016, I electronically filed the foregoing **SOUTH BURLINGTON'S *AMICUS CURIAE* MEMORANDUM IN LIMITED SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system, where it is available for viewing and downloading.

BY: /s/ John H. Klesch

John H. Klesch, Esq.

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